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No. _____

In The
Supreme Court of the United States

CHESTNUT RIDGE VOLUNTEER FIRE COMPANY, et al.,

Petitioners,

v.

SCOTT GOLDSTEIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

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APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[Filed January 7, 1999]

No. JFM-96-1483

SCOTT GOLDSTEIN)
Plaintiff,)
)
v.)
)
THE CHESTNUT RIDGE)
VOLUNTEER FIRE COMPANY,)
et al.,)
Defendants.)
)

MEMORANDUM

Scott Goldstein has brought this suit against the Chestnut ridge Volunteer Fire Company ("Chestnut Ridge") and its officers, Richard Yaffe, Ross McCausland, Harry Kakel, William Newberrey III, Michael Fox, Eugene Reynolds and Nick Coroneos, under 42 U.S.C. § 1983. Goldstein alleges that defendants unlawfully disciplined, suspended, and terminated him for exercising his First Amendment rights. Defendants have moved for summary

judgment and plaintiff has moved for summary judgment on the issue of suspension. Defendants' motion will be granted, and plaintiff's motion will be denied.

I.

Scott Goldstein joined Chestnut Ridge in 1985 as volunteer fire fighter. Chestnut Ridge is governed internally by a series of officers elected from the membership of the company.[1] Officers are elected to one-year terms at the end of each calendar year. All individual defendants were officers of Chestnut Ridge during the times relevant to this lawsuit. Goldstein ran for and won a series of elected offices with Chestnut Ridge over the years, including recording secretary and first and third lieutenants. In December 1995, Goldstein ran unsuccessfully for the Captain's position.

In December 1995, Goldstein began writing and submitted a series of letters and memoranda that were critical of Chestnut Ridge's operations and personnel. Goldstein alleged that many volunteer members were not properly trained and/or certified to respond to emergency fire and medical alarms. The first such memorandum, addressed to the Executive Committee and dated December 20, 1995, alleged that certain Chestnut Ridge volunteer members lacked current CPR training. Chestnut Ridge President Richard Yaffe responded to Goldstein's memorandum with a memorandum to the Executive Committee dated December 25, 1995. Yaffe reminded the Executive Committee that any

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[1] In a previous ruling, I ruled that Chestnut Ridge is a state actor for the purposes of § 1983.

member who does not have current CPR training cannot ride the fire trucks.

This exchange was followed by several more critical letters from Goldstein in January 1996. In a telephone conversation with and follow-up letter to Yaffe on January 19, 1996, Goldstein agreed that he would "bring any problems to [Yaffe's] attention for resolution before resort to any other actions in the future." On March 10, 1996, Goldstein again wrote to Yaffe regarding inadequate training and certification of Chestnut Ridge members. Goldstein did not receive a response from Yaffe that day; therefore, on March 11, 1996, Goldstein sent an identical memorandum to the Executive Committee.

Yaffe suspended Goldstein on March 15, 1996 for Goldstein's failure to abide by their agreement of January 19, 1996 that he would bring any problems to Yaffe before approaching the Executive Committee. Yaffe brought the suspension before the Executive Committee, charging that Goldstein violated Article V, Sections 2.2 and 2.4 of the Chestnut Ridge bylaws. These sections prohibit members from engaging in behavior detrimental to the good order of the company, and from making comments or engaging in behavior prejudicial to the good reputation, order, and discipline of the company.

Yaffe appointed three members of Chestnut Ridge to an Investigating Committee, which investigated the allegations against Goldstein. The Investigating Committee recommended to the Executive Committee that Goldstein be suspended for a period of 90 days. The Executive Committee voted to suspend Goldstein for 90 days on March 21, 1996. Goldstein

exercised his right under the bylaws to have the full company vote on the suspension. The full membership upheld the suspension, with defendant Michael Friedel voting against suspension.

In late May 1996, during his suspension from Chestnut Ridge, Goldstein taught a series of CPR classes. On May 20, 1996, Goldstein taught a CPR class in Woodlawn, off firehouse premises. Among those on the roster for the class that night was Eddie Ryan, a Chestnut Ridge member. Yaffe testified that Goldstein informed him by telephone that Ryan had taken the class on May 20. Goldstein denies making such a statement to Yaffe. Ryan was not at the CPR class on May 20, because he was seen on the video surveillance system at the firehouse at the time of the class. Yaffe also spoke to Ryan later and reported that Ryan told him he had not taken a CPR class since he had been in the Navy. Ross McCausland, another member of the Executive Committee, also recalled Ryan's statement that he had not had a CPR class since his Navy days.

The Executive Committee became aware that Goldstein may have falsified CPR records and made false statements to Executive Committee members regarding Ryan's attendance on May 20. Michael Friedel investigated the matter and filed charges against Goldstein. Yaffe then appointed an Investigating Committee composed of Ross McCausland, Harry Kakel, and Eugene Reynolds. Ryan advised the Investigating Committee that he had taken and passed a CPR test at Goldstein's house on May 22, 1996, not May 20, 1996. Goldstein wrote a letter to Friedel on August 11, 1996, explaining that he had taught three classes that week, one on May 20 and two on May 22. Goldstein

explained that he had simply made an error in writing Ryan's name on the roster for May 20 instead of May 22. The Investigating Committee recommended that the Executive Committee dismiss Goldstein from Chestnut Ridge membership.

On August 29, 1996, Goldstein faxed a letter signed by Eddie Ryan to the Executive Committee. The letter stated that Ryan's previous statements had been misconstrued, and that Ryan had in fact taken and passed the CPR test on May 22, 1996 at Goldstein's house. That same day, the Executive Committee voted to expel Goldstein from Chestnut Ridge membership, with Harry Kakel voting against expulsion. Goldstein did not appeal this decision to the full membership.

II.

Plaintiff assets that he was disciplined, suspended, and terminated by defendants for exercising his First Amendment rights to address matters of public concern in letters to the company regarding training and safety issues within Chestnut Ridge. Defendants argue that plaintiff was not suspended or terminated because of the content of his communications, but for other, non-protected reasons.

A case such as this requires that the court strike "a balance between the interests of the [employee], as a citizen, in commencing upon matters of public concern and the interest of the [public employer] in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). Courts use a three-step analysis for claims like plaintiff's. See Daniels v. Quinn, 801 F.2d 687, 689 (4th Cir. 1986). First

the Court must determine, as a matter of law, whether plaintiff's statements concerned matters of legitimate public, rather than private, interest. See id.; see also Connick v. Myers, 461 U.S. 138, 145-48 (1983). If the Court determines that the statement involved a matter of public concern, then plaintiff must establish that he would not have been discharged "but for" his speech. Daniels, 801 F.2d at 687. To do so, plaintiff must come forth with sufficient facts to permit a determination that his statements were a substantial motivating factor in his dismissal. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Once plaintiff has done so, the burden shifts to defendant to come forward with enough facts to demonstrate, by a preponderance of the evidence, that plaintiff would have been fired even in the absence of his comments. Id. Finally, the Court must determine whether defendants' interest in maintaining internal order and carrying out the public mission of Chestnut Ridge outweighs the public interest in plaintiff's comments. Daniels, 801 F.2d at 689-90.

A.

Goldstein argues that he was suspended because of the series of letters he wrote from December 1995 through March 1996. These letters alerted President Yaffe and the Executive Committee to some allegedly unsafe procedures of Chestnut Ridge. Goldstein accused the Captain of Chestnut Ridge of failing to send sufficient qualified medical personnel on emergency calls, failing to ensure that the proper equipment was on the fire trucks for each emergency call, and inconsistently enforcing Chestnut Ridge's bylaws. Because Goldstein criticized the actions of public officials and questioned the propriety of actions taken by a governmental

entity, his letters involved a matter of public concern. See Connick, 461 U.S. at 147-49. Indeed, his letters addressed a matter of public safety, which is one of the most public concerns imaginable.

Thus Goldstein's letters did contain protected speech. The next question is whether expression of his protected comments constituted a substantial factor in defendants' decision to suspend him. Mt. Healthy, 429 U.S. at 287. This presents a close question, because it is not apparent whether plaintiff was suspended because of the content of his speech or the manner in which it was communicated. Several members of the Executive Committee testified in their depositions that plaintiff's "false allegations," "letters," and "accusations" were among the reasons they voted for suspension. On the other hand, most members of the Executive Committee also cited the disruptive nature of plaintiff's "nitpicking" and the "detractive manner" and tone of his letters. Two members noted Goldstein's failure to abide by his agreement with Yaffe to bring all problems to Yaffe before going to the Executive Committee.

Further complicating the situation is defendants' testimony that other members of the company felt unsafe working the Goldstein, and that Goldstein's behavior was "disruptive" and put the company in a "state of turmoil." Henry Kakel, one of the committee members, has testified on deposition that he linked plaintiff's letters to Goldstein's recent loss in the race for Captain of the company and that he believed that under the circumstances Goldstein's absence for a time would lessen the disruption.

In the final analysis it is virtually impossible to clearly delineate between the contents of Goldstein's letters and the manner in which he expressed himself. If the letters had resulted in Goldstein's immediate termination, I would deny defendants' summary judgment motion and leave it for the jury to determine what motivated their decision. However, I am persuaded that precisely because it is impossible to draw a precise line of demarcation and because defendants' action was the limited one of temporary suspension rather than dismissal, they are entitled to the summary judgment they seek.

Chestnut Ridge has a legitimate interest in maintaining an orderly and safe work environment. The maintenance of such an environment is itself essential to the public safety. Although Goldstein's safety concerns may have been legitimate - and Yaffe indicated that some of them were - the manner in which he raised them was so disruptive to Chestnut Ridge's operation that the Executive Committee felt it was necessary to suspend him for 90 days. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Connick, 461 U.S. at 151-52. Perhaps even more than other public entities, a fire company must have a cohesive work environment. The Executive Committee's response was proportionate to the harm that it reasonably perceived and therefore, in my judgment, was constitutionally justified under the circumstances.

B.

Goldstein argues that his dismissal from membership in August 1996 was also a result of his protected speech.

However, Goldstein does not offer any facts to show that his protected speech was a substantial motivating factor in his expulsion. Instead, Goldstein attempts to prove that the Executive Committee was mistaken in its conclusion that Goldstein falsified the CPR class records. Goldstein argues that summary judgment cannot be granted because there are factual disputes regarding the CPR class. However, such discrepancies are not ultimately material. All five members of the Executive Committee who voted in favor of expulsion testified that they voted to expel because of their belief that Goldstein had falsified documents. Even if defendants' belief that Goldstein falsified records was ultimately found to be incorrect, Goldstein was nonetheless expelled for action not protected by the First Amendment.[2]

For these reasons, defendants' motion for summary judgment is granted, and plaintiff's motion for partial summary judgment is denied. A separate order to that effect is being entered.

January 7, 1999
Date

/s/
J. Frederick Motz
United States District Judge

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[2] Of course, if the evidence upon which an employer discharged an employee was so weak as to give rise to the inference that it was pretextual, there would exist an issue of fact to be decided by the jury. That, however, is not the case here where there was sufficient evidence from which the members of the Executive Committee could properly find that Goldstein had falsified records.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed January 7, 1999]

No. JFM-96-1483

SCOTT GOLDSTEIN	)
Plaintiff,	)
	)
v.	)
	)
THE CHESTNUT RIDGE VOLUNTEER FIRE COMPANY, et al.,	)
Defendants.	)

ORDER

For the reasons stated in the memorandum entered herewith, it is, this 7th day of January, 1999

ORDERED that

1. Defendants' motion for summary judgment is GRANTED; and

2. Plaintiff's motion for partial summary judgment is DENIED.

/s/_____

J. Frederick Motz
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[Dated November 13, 1997]

No. JFM-96-1483

SCOTT GOLDSTEIN	)
Plaintiff,	)
	)
v.	)
	)
THE CHESTNUT RIDGE	)
VOLUNTEER FIRE COMPANY,	)
et al.,	)
Defendants.	)
	)

MEMORANDUM

Plaintiff, Scott Goldstein, has brought this action under 42 U.S.C. § 1983 against defendants The Chestnut Ridge Volunteer Fire Company and members of its Executive Committee (collectively "Chestnut Ridge" or "the Fire Company"). Plaintiff alleges that he was disciplined, suspended, and ultimately discharged for informing Chestnut Ridge that several of its members lacked necessary training and qualifications. Plaintiff claims that these actions violated his First Amendment rights.

Chestnut Ridge has moved for summary judgment on the ground that it is not a "state actor" under the Fourteenth Amendment so that its actions cannot be deemed to be "under color of state law" under section 1983. Goldstein has filed a cross motion for summary judgment on the same issue.

I.

The courts have derived three tests for determining if particular conduct by a private entity constitutes state action: (1) the symbiotic relationship test, (2) the regulation/public funding test, and (3) the public function test. See generally Conner v. Donnelly, 42 F.3d 220, 223-24 (4th Cir. 1994). In Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211, 215-16 (4th Cir. 1993), the Fourth Circuit ruled that the symbiotic relationship test applies only where a private entity is a lessee of public property, and that in Maryland volunteer fire departments are not so extensively regulated as to become state actors. Therefore, the question narrows to whether Chestnut Ridge can be deemed to be a state actor under the public function test.

In applying this test it is not sufficient merely to ask "whether a private group is serving a 'public function.' . . . the question is whether the function performed has been 'traditionally the exclusive prerogative of the State.'" Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)). This question is not always easy to answer. As noted by the Fourth Circuit in Haavistola,

> [r]eview of the . . . precedents and decisions does little to simplify the issue of when a

> private entity assumes the role of state actor due to its involvement or provision of an exclusive public function. The cases inform the analysis in two ways: first, the determination is a factually intense analysis; and second, its outcome hinges on how a given state itself views the conduct of the function by the private entity.

6 F.3d at 218.

The district court in Haavistola had granted summary judgment for the defendant, finding that "nothing . . . indicates that firefighting has traditionally been the exclusive province of the State of Maryland." 812 F.Supp. 1396 n. 20. The Fourth Circuit reversed this ruling, holding that the district court had erred by making its determination "without any direct evidence as to how fire protection is conducted throughout the State" and in taking judicial notice "of the facts that many volunteer fire departments operate in Maryland without governmental intervention at all and that all volunteer fire departments operate in a gray area as to the function they provide." 6 F.3d at 218.

After remand a trial was conducted in Haavistola and the jury returned a verdict finding that the Community Fire Company of Rising Sun was not a state actor. The plaintiff did not take an appeal. Thereafter, the Fourth Circuit reversed and remanded for trial a decision I rendered in an earlier case brought against Chestnut Ridge in which I held that the Fire Company was a state actor as a matter of law. Goldstein v. Chestnut Ridge Volunteer Fire Co., 25 F.3d 1039, 1994 WL 233356 (4th Cir. 1994) ("Goldstein I"). In

a separate concurring opinion Chief Judge Wilkinson expressed his view that the state action issue should be resolved as a matter of law. Chief Judge Wilkinson further indicated that if the issue is to be treated as a question for the fact finder, the verdict reached by the Haavistola jury should be accorded respect and that "a significant burden should rest with any party seeking to depart from that [verdict]."[1] 1994 WL 233356 at * 4.

II.

For the reasons that follow I again find that Chestnut Ridge is a state actor as a matter of law. I realize that my ruling could be considered an obstinate refusal to follow the Fourth Circuit's precedent; I hope that it is not interpreted as such. I must confess that I do fully subscribe to Chief Judge Wilkinson's view that a myriad of considerations, including predictability, the absence of any underlying genuine disputes of fact, and proper regard for the respective roles of judges and juries, makes the state action issue one which is appropriate for resolution by summary judgment. Nonetheless, if the record in the present case was precisely the same as in Goldstein I, I would, of course, submit the issue to the jury. However, historical evidence which has been added to the record has further clarified the question and reinforced the conclusion I previously reached.[2]

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[1] The earlier case was instituted by Ivan Goldstein, the father of the plaintiff in the present action. The case was voluntarily dismissed by the plaintiff after remand.

[2] I should add that I feel somewhat responsible personally for having contributed to the perplexing current state of the law.

III.

A.

Chestnut Ridge is a non-profit corporation operating under its own constitution and bylaws. It owns the land and building from which it operates as well as all of the engines, hoses, and related equipment it employs in fire suppression and rescue activities. It elects its own officers and directors. Those officers are charged with the duty of maintaining discipline and taking personnel actions necessary for the preservation of good order and morale within the company.

Career and volunteer fire companies in Baltimore County are dispatched to fire scenes by a central county dispatcher. The factors considered by the dispatcher in determining whom to call are the location and severity of the fire or emergency event. At the fire scene, volunteer fire companies are sometimes in command over career fire companies, while on other occasions career and volunteer fire companies share command at the scene.

In Goldstein I I wrote only a letter opinion, summarily stating my conclusion that firefighting is a public function. I did not give the issue the careful treatment it deserves. In any event, if I have not been faithful to Fourth Circuit precedent, my waywardness should be promptly corrected. Accordingly, in the order accompanying this opinion, I expressly state (so that Chestnut Ridge may seek an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)) that my ruling involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.

Chestnut Ridge (like all volunteer fire companies in Baltimore County) is a member of the Baltimore County Volunteer Fire Association ("BCVFA"). The BCVFA requires that volunteer firefighters have certain types of certification and/or training before they fight a fire in the county. These are the same types of certification and training that the Baltimore County Fire Department requires of its career firefighters. If a volunteer fire company's members fail to meet those requirements, the volunteer company will be suspended from the BCVFA. If the volunteer fire company is suspended, the Baltimore County Fire Department will take the volunteer fire company off its dispatch system and will not dispatch that volunteer fire company to fight any fires in the county.

B.

Article 38A, section 7 of the Maryland Code establishes the Office of the Fire Marshal, whose responsibilities include "the establishment and enforcement of fire safety practices throughout the State, preventive inspection and correction activities, coordination of fire safety programs with volunteer and paid fire companies, and other State agencies and political subdivisions exercising enforcement aspects, and critical analysis and evaluation of Maryland fire loss statistics for determination of problems and solutions." Md. Ann. Code art. 38A, § 7(b) (1997). In addition, the Maryland State Firemen's Association, a state-funded association, conducts annual inspections of all fire and rescue apparatus, equipment, and facilities. Md. Ann. Code art. 38A, § 46B.

State-funded training is required for volunteer fire company members, and is conducted by the Maryland Fire and Rescue Institute at the University of Maryland, a state institution. Md. Code Ann., Educ. § 13-103 (1997). Volunteer fire companies and their personnel are immune from civil liability for acts taken in the performance of their duties. Md. Code Ann., Cts. & Jud. Proc. §§ 5-309, 5-309.1 (1995). Chestnut Ridge's ambulance service is required to be licensed under section 13-515 of Maryland's education code. State grants and loans to volunteer fire companies, including Chestnut Ridge, are made through the Emergency Assistance Trust Fund and approved and monitored by State agencies. Md. Ann. Code art. 38A, § 46A.

Volunteer fire departments, including Chestnut Ridge, receive significant portions of their operating revenue from the State of Maryland. For example, Chestnut receives State funding that is appropriated by the State to promote:

> (1) The delivery of effective and high quality fire protection, rescue, and ambulance services to the citizens of this State;
>
> (2) Increased financial support for fire, rescue, and ambulance companies by local governments; and
>
> (3) The continued financial viability of volunteer fire, rescue, and ambulance companies given the greatly increased costs of apparatus and other types of equipment.

Md. Ann. Code art. 38A, § 45B. Payments under this statute are made to each county for distribution to fire companies for the purchase of equipment and rehabilitation of facilities. Id. Funds distributed to fire companies under this statute are conditioned upon compliance with a requirement that they be audited and copies of the account be submitted to a State agency. Md. Ann. Code art. 38A, §§ 45C-D. Chestnut Ridge receives operating revenue from the State and Baltimore County governments, and uses these funds for items such as insurance, utilities and fuel.

Under Maryland and Baltimore County law, grants and loans are also provided for volunteer fire companies. See, e.g., Baltimore County Code §§ 15-161 et seq. (1988). Members of volunteer fire companies are covered under State and county benefit plans. See, e.g., Md. Ann. Code art. 38A, §§ 42-42B (disability benefits); Md. Code Ann., Lab. & Empl. § 9-234 (1991 & Supp. 1996) (workers' compensation); Md. Ann. Code art. 48A, § 425 (1994) (group life insurance); Baltimore County Code § 23-147 (pensions). Volunteer firefighters are considered on duty for purposes of the Public Safety Officer's Benefit Act. Md. Ann. Code art. 38A, § 45. Volunteer fire companies and firefighters receive several tax benefits and exemptions, see, e.g., Md. Code Ann., Tax-Prop. § 7-209 (1994), and are exempt from paying State and county fees that other private corporations are required to pay. Md. Code Ann., Corps. & Ass'ns § 1-203.1 (1993).

IV.

A.

Although the foregoing facts demonstrate that in Maryland volunteer fire departments are extensively regulated by the State and that they and their members receive substantial financial benefits from the State, these facts alone clearly would not entitle me to hold that Chestnut Ridge is a state actor. Virtually the same facts were before the Fourth Circuit in Haavistola and Goldstein I when the court remanded the cases for trial on the state action issue.

The factor that I now find decisively tips the balance in favor of finding that Chestnut is a state actor is the existence of two Maryland statutes which confer inherently sovereign powers upon volunteer firefighters. Under Article 48, section 181(a), volunteer fire companies are given the authority to enter buildings where a fire is in progress, to order any person to leave the building, to order caravans of vehicles, crafts or railway cars to be detached, and to maintain order in the vicinity of a fire or other emergency.[3] Likewise, members of volunteer fire companies may be appointed "fire police" with the powers of deputy sheriffs, including the power to arrest, while at fires and on their way to and from fires. Maryland Ann. Code art. 87, § 49 et seq. (1991 & Supp.1994).

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[3] An individual who obstructs a fire investigation or refuses to remove combustible materials is subject to criminal penalties. Maryland Ann. Code art. 48, §§ 181(b), 182 and 183.

Can there be any doubt that the exercise of the powers to enter buildings, order persons to leave buildings, make arrests, and commandeer private vehicles is "traditionally the exclusive prerogative of the State?" Rendell-Baker v. Kohn, 457 U.S. at 842. Indeed, to the extent that it is not sanctioned by the State, the performance of such acts would be a crime. Could there be any more clearly definitive guiding line?[4]

B.

The parties in the present case have placed in the record more historical information than was presented in Goldstein I. The information is of interest. Goldstein has submitted a report and affidavit from Whitman Hawley Ridgway, a tenured history professor at the University of Maryland, in which Professor Ridgway concludes "within a reasonable degree of Maryland historical certainty and probability that fire fighting was traditionally an exclusive public function in Baltimore County, Maryland." Professor Ridgway supports his opinion by reference to various historical facts. First, prior to 1881 organized fire protection in the most populous area of Baltimore County, known as "the Belt," had (with one exception) depended upon the services of Baltimore City units from contiguous areas. Second, in 1881

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[4] The Second Circuit, in Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979), also recognized the importance of this conferral of power upon volunteer firefighters. In concluding that a Connecticut volunteer fire department was a state actor, the court relied in part on several statutes that "grant[ed] to volunteer firemen certain powers traditionally associated with sovereignty," including the power to maintain order at fire scenes. Id. at 24.

the Baltimore County Fire Department was established. Third, the Waverly Fire Company, the exception just noted, which had been created in 1878 when the county financed the construction of its building and the purchase of its fire equipment, turned over its property to the county's Fire Commissioner when the County Fire Department was established in 1881. Finally, in the years after its establishment the County Fire Department rapidly grew.

Although Chestnut Ridge has not come forward with historical testimony opposing the opinion of Professor Ridgway, I do not find the professor's opinion to be dispositive. He has not presented any evidence discussing firefighting practices in the county prior to 1881 beyond the area known as the Belt. Moreover, one of the works upon which Professor Ridgway relies, a history of firefighting in Baltimore County, documents that after the turn of the century, "while the growth of the county's paid department slowed, volunteer fire companies were enjoying a boom period." Betsy Weaver & Gary E. Frederick, Hands, Horses and Engines 35 (1982). Over fifteen volunteer companies were formed soon after the turn of the century. Id. at 35-44.

On its face this evidence not only seems to contradict to some extent Professor Ridgway's conclusion, it could be viewed as definitively establishing that in Baltimore County firefighting has not traditionally been the exclusive prerogative of the State. Over time, however, there have been other developments, statutory in nature, which (although not referred to by Professor Ridgway) are of significant historical importance. In 1922, members of Baltimore County fire companies, both volunteer and paid, were authorized to be appointed deputy sheriffs. Act of Apr. 13, 1992, ch. 414,

1922 Md. Laws 907. The firefighters were to exercise their deputy powers both at fires and on route to and from fire calls. This statute was later extended to firefighters in other Maryland counties and its present version is, as recited above, found at Md. Ann. Code art. 87, § 49 et seq. Further, in 1973, volunteer fire companies in Baltimore County were granted "peacekeeping" authority to enter buildings to fight fires and to maintain order at fire scenes. Act of April 26, 1973, ch. 73, 1973 Md. Laws 134. This statutory authority is, as recited above, now located in Md. Ann. Code art. 48, § 181(a).[5] Since it is the possession and exercise of these powers that I find to be the traditional prerogatives of the State, whatever the status of volunteer fire companies in

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[5] There are interesting anomalies in the legislative history of the statutes defining the powers of Maryland's volunteer firefighters. In 1929, volunteer fire companies throughout the state, except Baltimore County, were granted the power to conduct inspections for fire hazards. Act of Apr. 11, 1929, ch. 260, 1929 Md. Laws 780. Even today the Baltimore County Fire Department has exclusive authority within the county to conduct such inspections although volunteer fire companies throughout the rest of the state have retained that power in their jurisdictions. Md. Ann. Code art. 38A, § 181(a). Likewise, some of the "peacekeeping" powers that were not granted to volunteer fire companies in Baltimore County until 1973 were conferred upon volunteer fire companies throughout the remainder of the state in 1951. Act of Apr. 13, 1951, ch. 372, 1951 Md. Laws 1119. In contrast, the authorization granted in 1922 to members of Baltimore County volunteer fire companies to be appointed deputy sheriffs was only extended to other firefighters in the state starting in 1945. See, e.g., Act of Mar. 24, 1945, ch. 375, 1945 Md. Laws 346 (Washington County). None of these anomalies affect the conclusion I have reached.

Baltimore County may have been prior to 1922 or 1973, I am of the firm opinion that they are now state actors.

C.

In reaching the conclusion that I have I am acutely aware of the care with which courts have circumscribed the state action doctrine. For example, the Supreme Court has held that a utilities company, a nursing home and a private secondary school are not state actors. See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). Similarly, the Fourth Circuit has held that a private, non-profit corporation that organizes and promotes an annual municipal festival is not a state actor. See United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995). The caution reflected in these opinions is entirely appropriate. The line between public and private activity cannot be clearly defined and, if promiscuously applied, the public function test could encompass within section 1983 and the Fourteenth Amendment various activities conducted by private entities, including education and health care, which, although proper subjects of regulation and funding, traditionally have not been solely within the province of the State.

Firefighting, however, is an activity of an entirely different nature. No reasonable person living in today's society would suggest that providing protection from fire, at least in a populated urban or suburban setting, has not become one of the fundamental responsibilities of government, which requires for its proper performance the conferral of the most fundamental police powers upon firefighters. While that

responsibility may be delegated, the body politic would not permit it to be devolved to private enterprises. As one thoughtful commentator has noted, if the public function test excludes volunteer fire companies from the category of persons who are deemed to be state actors, the test requires reformulation or recasting. See Ronald J. Krotoszynski, Back To The Briarpatch: An Argument In Favor Of Constitutional Meta-Analysis In State Action Determinations, 94 Mich. L.Rev. 302, 328-32 (1995). Perhaps purists will reach the conclusion that this is what is necessary. A far easier solution is for the courts simply to apply the existing test in a sensible manner.

V.

There is a remaining issue to be considered. In Blum v. Yaretsky, 457 U.S. at 1011-12, the Court, after rejecting the contention that the defendant, a nursing home, provided a public function, went on to state:

> Even if respondents' characterization of the State's duties were correct, however, it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. Indeed, respondents make no such claim, nor could they.

Under this reasoning a private party could be considered a state actor for those decisions that directly affect the public, yet escape liability under § 1983 for internal administrative decisions.

There has been surprisingly little discussion of Blum's statement in subsequent cases.[6] Several Fourth Circuit cases have mentioned this aspect of the decision, however, providing some insight into its potential effect on state action analysis. In Hicks v. Southern Maryland Health Systems Agency, 737 F.2d 399, 402 (4th Cir. 1984), the court, in rejecting a finding of state action under a public function theory, stated that "the court in Blum restricted its application to cases where the state traditionally and exclusively had assumed day-to-day administration." More recently, in Gaston Festivals the court cited Blum's language while discussing what constitutes a governmental decision covered by section 1983. 43 F.3d at 911. Perhaps most importantly, however, in Haavistola the court, in describing the parameters of the public function analysis, stated that Blum "suggested that the analysis should involve review of the alleged misconduct, and not just the overall function of the alleged state actor." 6 F.3d at 216.

In at least one other case, however, the Fourth Circuit has seemingly rejected applying Blum's reasoning in this sort of situation. In Andrews v. Federal Home Loan Bank of

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[6] There has also been little academic commentary on the subject. In one of the few discussions of the issue, one commentator noted that "the Blum decision for the first time specifically couched the public function test in nexus terms. Such language may indicate that the public function test now requires not only scrutiny of the precise nature of the activity being challenged, but also some nexus between the state and that activity." Ronna G. Schneider, The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change, 60 Notre Dame L.Rev. 1150, 1176-77 (1985).

Atlanta, 998 F.2d 214, 216 (4th Cir. 1993), the plaintiff was terminated as a field examiner for the defendant. Plaintiff filed suit, alleging that he was fired for criticizing a change in the defendant's asset-classification policy, in violation of the First Amendment. Id. In considering whether the defendant was performing a public function, the court stated:

> The district court identified personnel decisions as the function at issue. It then held personnel decisions not to constitute a public function. While we would not differ with that characterization, we think that the Bank's status as a governmental entity is what the parties contest for purposes of state action doctrine. If the Bank were held to be performing a public function for purposes of state action doctrine, then it would be difficult to conclude that personnel decisions reached during the performance of that public function were not subject to constitutional strictures.

Id. at 219 n. 1. Thus, unlike the "piecemeal" approach to state action analysis seemingly endorsed by Blum, in Andrews the court adhered to a "unified" approach, in which even internal administrative decisions made by a private party can give rise to section 1983 liability, if the party performs a public function.

In my judgment the dictum in Blum is sound. Even if a defendant is deemed to be a state actor, a second inquiry should be made as to whether the conduct at issue in the litigation peculiarly relates to the defendant's performance of a public function. Under this approach a routine employment

decision, alleged to have been motivated by unlawful discriminatory animus (such as the decisions involved in Haavistola and Goldstein I), would not be actionable under section 1983 (although it would, of course, be actionable under other anti-discrimination statutes, such as Title VII, the Age Discrimination in Employment Act, and, where it applies, section 1981).

That limiting doctrine is of no help to Chestnut Ridge in this case, however. Plaintiff alleges that he was disciplined, suspended, and terminated for informing Chestnut Ridge that several of its members lacked necessary training and qualifications. Clearly, these alleged communications directly related to the public function which Chestnut Ridge performs. Accordingly, adverse employment actions taken in reaction to them fall within the purview of section 1983.

A separate order effecting the rulings made in this memorandum is being entered herewith.

Date: November 13, 1997 /s/_____
J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Dated November 13, 1997]

No. JFM-96-1483

SCOTT GOLDSTEIN
Plaintiff,

v.

THE CHESTNUT RIDGE VOLUNTEER FIRE COMPANY, et al.,
Defendants.

ORDER

For the reasons stated in the memorandum entered herein on August 21, 1997 and in the memorandum to counsel being entered herewith, it is, this 13th day of November 1997

ORDERED

1. Defendants' motion for summary judgment is denied;

2. Plaintiff's motion for summary judgment is denied on the ground that ultimate resolution of the cognizability of this action under 42 U.S.C. § 1983 will turn

upon the merits of the reasons that plaintiff was disciplined, suspended, and terminated;

3. Defendants' motion to alter or amend judgment is granted in part and denied in part; and

4. Pursuant to 28 U.S.C. § 1292(b), I state, so that the defendants may, if they choose, seek to take an interlocutory appeal, that I am of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

/s/_____
J. Frederick Motz
United States District Judge